MOTION FILED
MAR 1 1993

92-1428

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

DANIEL SAPHIRE
General Attorney
Association of American Railroads
American Railroad Building
50 F Street N.W.
Washington, D.C. 20001
(202) 639-2505

FRANCIS D. MORRISSEY
Counsel of Record
MICHAEL A. POLLARD
DONNA J. WILLIAMS
BAKER & McKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-8000

Counsel for Amicus Curiae, Association of American Railroads

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.4 of the Rules of this Court, the Association of American Railroads ("AAR") respectfully moves for leave to file the attached Brief Of Amicus Curiae in support of Petitioner. Petitioner Chicago and North Western Transportation Company has consented to the filing of this brief. Respondent Tracy Templeton has refused consent to filing of this brief.

As is more fully set forth in the section of the brief entitled Statement Of Interest Of Amicus Curiae, the AAR is a voluntary, not-for-profit corporation headquartered in Washington, D.C. Its members constitute the majority of the nation's major railroads. The AAR's members operate approximately 76 percent of the line-haul mileage, produce

approximately 91 percent of the freight revenue, and employ approximately 90 percent of the railway work force in the United States, with nearly 225,000 employees.

The AAR is actively involved in the establishment of standards and recommended practices relating to railroad safety. Consequently, railroad operations and safety are among the purposes and concerns of the AAR. The interpretation and application of uniform federal laws and regulations also are matters of great importance to the AAR and its member railroads. The members of the AAR have a direct interest in maintaining uniform railroad safety regulations and in ensuring that railroads are not subject to arbitrary state court decisions in direct contravention of federal law.

The divided decision of the Illinois Supreme Court, in an action brought pursuant to the Federal Employers' Liability Act ("FELA") 45 U.S.C. §51, *et seq.*, violates traditional notions of federal supremacy and endangers the existence of a uniform set of federal laws and regulations governing the national railway system. The state high court, reversing a decision of the state intermediate court of appeals, determined, contrary to the overwhelming weight of federal authority, that the Federal Railroad Administration ("FRA") did not exercise exclusive jurisdiction over the safety of railroad employees working on bridges and allowed the Petitioner to be adjudged negligent in a FELA case for allegedly violating certain OSHA regulations. As further developed herein and in the Petition For Writ Of Certiorari, the state high court's decision is in direct conflict with indisputable pronouncements of all three branches of the federal government.

The state high court's unprecedented rejection of well-established federal authority and its unilateral diminution

of the FRA's established jurisdiction over the safety of railroad operations is a matter of great concern to railroads across the nation. The AAR submits that the decision of the Illinois Supreme Court, if allowed to stand and be followed, will lead to the continuing degeneration of uniform railroad safety regulations and to the development of a patchwork of regulations on a state-by-state basis. Such piecemeal and haphazard railroad regulation will cause confusion in the industry and will disrupt the efficient operation of the national railroad system. In light of the importance of these issues to the nation's railroads, it is appropriate that this Court consider the views of the AAR as set forth in this brief amicus curiae.

Wherefore, the Association of American Railroads prays that this Court grant this Motion for Leave to file its Brief Amicus Curiae.

Respectfully submitted,

DANIEL SAPHIRE
General Attorney
Association of American Railroads
American Railroad Building
50 F Street N.W.
Washington, D.C. 20001
(202) 639-2505

FRANCIS D. MORRISSEY
Counsel of Record
MICHAEL A. POLLARD
DONNA J. WILLIAMS
BAKER & McKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-8000

Counsel for Amicus Curiae, Association of American Railroads

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
THE STATE HIGH COURT'S REJECTION OF CLEAR AND LONG-STANDING FEDERAL AUTHORITY CREATES A DANGEROUS PRECEDENT AND PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW	4
A. All Three Branches Of The Federal Government Have Recognized The Importance Of Uniform Regulation Of Railroad Bridge Safety	4
B. Railroads Across The Nation Will Be Substantially Prejudiced If Railroad Safety Regulation Occurs On A Haphazard, Piecemeal Basis	9
C. Established Principles Of Federal Supremacy And Justice Mandate The Preservation Of Uniform Regulation Of Railroad Operating Safety	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: PAGE

Atchison, Topeka & Santa Fe Ry. v. Illinois Commerce Comm'n, 453 F. Supp. 920 (N.D. Ill. 1977) 11

Dice v. Akron, C & Y R.R., 342 U.S. 359 (1952) . 14

Gade v. National Solid Wastes Management Ass'n, ___ U.S. ___, 112 S. Ct. 2374 (1992) 10, 13

Norfolk & W. Ry. v. Public Utilities Comm. of Ohio, 727 F. Supp. 367, *aff'd.*, 926 F.2d 567 (6th Cir. 1991) 5, 6, 7, 10, 11

Secretary of Labor v. Consolidated Rail Corp., 10 OSHC 1577 (1982) 8

Southern Pacific Transp. Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) 5

Southern Ry. v. Occupational Saf. & H. Rev. Comm., 539 F.2d 335 (4th Cir. 1976) 5

Velasquez v. Southern Pacific Transp. Co., 734 F.2d 216 (5th Cir. 1984) 5, 6, 7

STATUTES:

The Federal Railroad Safety Act, 45 U.S.C. § 421 *et seq.* 5, 10

Rail Safety Improvement Act:

45 U.S.C. § 431 6

45 U.S.C. § 434 10

Occupational Safety and Health Act:

29 U.S.C. § 653 10

29 U.S.C. § 667 ..... 10, 14

OTHER AUTHORITIES:

H.R. Rep. No. 91-1194, U.S. Cong. and Ad. News 4104 (1970) 5, 13

43 Fed. Reg. 10583 (1978) 7, 9

56 Fed. Reg. 3436 (1991) 12

57 Fed. Reg. 28116 (1992) 11

29 C.F.R. § 1926.104 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Association of American Railroads ("AAR") is a voluntary, not-for-profit corporation headquartered in Washington, D.C. Its members constitute the majority of the nation's major railroads who operate approximately 76 percent of the line-haul mileage, produce approximately 91 percent of the freight revenues, and employ approximately 90 percent of the railway work force in the United States. Nearly 225,000 employees rely upon the railroads to provide safe working conditions. The AAR is actively

involved in the establishment of standards and recommended practices related to railroad safety. Consequently, among the interests of the AAR are the maintenance of a national and nationally uniform system of railroad safety regulation under the direction of the most appropriate federal agency, with extensive experience and expertise in the field of railroad operations and safety.

The important questions of federal law raised in the Petition address the significance of a state high court's erroneous application of federal regulations in contravention of overwhelming federal authority. Such questions are of vital concern to the AAR. The member railroads of the AAR continuously operate on an interstate basis under the purview of federal regulations. Historically, by mandate of Congress, these regulations were developed uniformly and were applied by the courts, both state and federal, on a consistent basis in accordance with federal law. The member railroads depended and relied upon that body of federal law in governing their conduct. Now, the Supreme Court of the State of Illinois, without precedent, has rejected well-established federal authority and clear Congressional mandates. The court has unilaterally diminished the Federal Railroad Administration's ("FRA") jurisdiction over railroad safety and retroactively penalized the Chicago and North Western Transportation Company for following those mandates.

The state high court has directly contravened existing federal legislation presenting an important question of federal law. The state high court also retroactively imposed upon the Petitioner, in a case arising out of an accident that occurred in 1984, the court's interpretation of a nonbinding FRA statement published in 1991, in spite of contrary federal authority establishing the state of the law in 1984. If other state courts attempt to regulate railroad

safety and operations in such a manner, then the ensuing state-by-state regulation of railroad operating safety will cause confusion in the industry and will disrupt the efficient operation of the nation's railroads. As each state attempts to fashion its own regulatory agenda, the uniformity of railroad regulations will be challenged at various levels. Inevitable confusion will arise as railroads attempt to conform to myriad state "interpretations" of what was once considered to be uniform federal law. Such confusion will not only hamper the railroads in their efforts to conform their conduct to law but will prove a real threat to employee safety.

The importance of uniform federal standards for the national railway system has been virtually unquestioned until the Illinois Supreme Court chose to ignore established federal precedent in violation of longstanding principles of federal supremacy. In light of the importance of these issues to the nation's railroads, it is appropriate that this Court consider the views of the Association of American Railroads as set forth in this brief *Amicus Curiae*.

SUMMARY OF ARGUMENT

The Illinois Supreme Court decision presents a challenge to the supremacy of federal law and to basic notions of justice. The propriety and importance of uniform regulation of the nation's railroad system is beyond dispute. The Congressional prescription for a uniform regulatory system administered through the Department of Transportation's Federal Railroad Administration has been affirmed by the federal judiciary, applied by the FRA and deferred to by OSHA.

The case at bar establishes a precedent of improper state judicial activism and judicial fragmentation of the regulation of railroad safety in a state where almost all the nation's major railroads conduct business. The decision of the Supreme Court of Illinois, which improperly diminishes the FRA's jurisdiction, is in direct and obvious conflict with overwhelming federal authority and defeats the Congressional intent to apply uniform regulations to matters involving railroad operations. If the Illinois Supreme Court's decision is allowed to stand, other state courts likely will fashion their own exceptions to the national norm. Such patchwork, *ad hoc* regulation, as exemplified by Illinois, will severely prejudice the nation's railroads.

ARGUMENT

THE STATE HIGH COURT'S REJECTION OF CLEAR AND LONG-STANDING FEDERAL AUTHORITY CREATES A DANGEROUS PRECEDENT AND PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW.

A. All Three Branches Of The Federal Government Have Recognized The Importance Of Uniform Regulation Of Railroad Bridge Safety.

As demonstrated below, all three branches of the federal government support FRA jurisdiction over railroad bridge safety. The Illinois court's erroneous rejection of federal precedent led it to impose OSHA jurisdiction rather than FRA jurisdiction over railroad bridges. If allowed to stand, the precedent established by this decision will impact significantly upon all aspects of railroad operations and safety.

Each branch of the federal government repeatedly has recognized that one federal agency overseeing the safety aspects of railroad operations, including railroad bridge work, is inestimably preferable to a myriad of state or federal regulatory agencies with varying rules or varying interpretations of the same rule. Congress explicitly has conferred authority for the regulation of railroad safety upon the FRA. *See* 45 U.S.C. § 421 *et seq.* (1970). The federal judiciary likewise has recognized the FRA's preeminence in railroad safety matters and the inapplicability of OSHA regulations to railroad bridge work in particular. *See Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984); *Norfolk & W. Ry. v. Public Utilities Comm. of Ohio*, 727 F. Supp. 367, *aff'd.*, 926 F.2d 567 (6th Cir. 1991); *Southern Pacific Transp. Co. v. Usery*, 539 F.2d 386, 391 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977); *Southern Ry. v. Occupational Saf. & H. Rev. Comm.*, 539 F.2d 335, 339 (4th Cir. 1976). Furthermore, the two executive agencies involved in this matter, the FRA and OSHA, likewise have recognized the FRA's exclusive jurisdiction over railroad safety matters in general and over railroad operational bridge safety in particular.

The United States Congress has long recognized the national character of the railroad industry. In enacting the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 421 *et seq.*, Congress reaffirmed in 1970 the importance of a comprehensive and uniform network of regulations governing all areas of railroad safety and operations. The FRSA's legislative history reflects the legislature's recognition of the railroad industry's "truly interstate character" which requires "a uniform body of regulations and enforcement." H.R. Rep. No. 91-1194, U.S. Cong. and Ad. News 4104, 4110 (1970). Pursuant to the FRSA, Congress required the Secretary of Transportation--not the Secretary of Labor—

to "prescribe . . . appropriate rules, regulations, orders, and standards for *all* areas of railroad safety." 45 U.S.C. § 431(a) (emphasis added).

Congress amended the FRSA by enacting the Rail Safety Improvement Act of 1988, 45 U.S.C. § 431(e) *et seq.* (1988). The 1988 amendment reconfirms FRA's exclusive jurisdiction over working conditions on or about railroad bridges, including safety equipment pertaining to fall hazards. The amended statute underscores Congressional conviction that the FRA is the most appropriate and uniquely qualified agency to assess the propriety of federal regulations designed to protect and promote the safety of employees working on or about railroad bridges. The 1988 Act specifically and unambiguously vests the Secretary of Transportation, and thus the FRA, with sole discretion and responsibility in issuing "such rules, regulations, orders and standards as may be necessary for the safety of maintenance-of-way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines . . . ." 45 U.S.C. § 431(n). The Congressional mandate thus is clear: the Secretary of Transportation, through the FRA, exercises preeminent jurisdiction over railroad bridge safety.

The federal judiciary has interpreted the FRSA and its amendment and has concluded that the FRA's jurisdiction over railroad bridge safety is exclusive and preemptive of other state or federal regulations. *Velasquez v. Southern Pacific Transp. Co.*, 734 F.2d 216 (5th Cir. 1984); *Norfolk & W. Ry. v. Public Utilities Comm. of Ohio*, 727 F. Supp. 367 (S.D. Ohio 1990); *aff'd.*, 926 F.2d 567 (6th Cir. 1991). The District Court in the *Norfolk* case concluded that the FRSA and its 1988 amendment preempted state regulation of railroad bridge safety and that the amendment "expressly confirm[ed] the Secretary's juris-

diction" in the area of bridge safety equipment. *Norfolk*, 727 F. Supp. at 371 (referring to the Secretary of Transportation). In *Velasquez*, a case described as "materially indistinguishable from the instant case" by the dissenting justices of the state high court, the federal appeals court specifically addressed the inapplicability of OSHA regulations to working conditions on railroad bridges. The court in *Velasquez* considered a Policy Statement issued by the FRA in 1978 declaring the FRA's exclusive jurisdiction over railroad bridges. The *Velasquez* court further affirmed that "OSHA regulations would not apply to . . . railroad bridges . . . ." *Velasquez*, 734 F.2d at 218, *quoting* 43 Fed. Reg. 10583, 10587. The United States Court of Appeals for the Fifth Circuit properly applied that FRA declaration in light of existing federal law and held that railroad bridges were not subject to OSHA regulation. *Velasquez*, 734 F.2d at 218. This federal decisional law upholds and preserves the uniformity of railroad safety regulations in accordance with continuing Congressional mandates.

The 1978 FRA Policy Statement considered by the court in *Velasquez* provides but one example of the FRA's assertion of exclusive jurisdiction over safety matters rooted in railroad operations. That Policy Statement dictated "that the safety of railroad operations [as defined in the Policy Statement] be the responsibility of a single agency . . . ." 43 Fed. Reg. 10583, 10585. Such an assertion of exclusive jurisdiction over railroad operations by the FRA was, and continues to be, consistent with federal law.

Less than one year after Congress amended the FRSA, the FRA reaffirmed its sole responsibility for the protection of railroad bridge workers in a letter to the Secretary of Labor. In that letter, dated March 7, 1989, the Assis-

tant Chief Counsel for Safety of the FRA cited the 1988 amendment to the FRSA in advising the Department of Labor that the FRA considered fall protection for railroad workers to be a matter within its regulatory purview and that it "expect[ed] to publish in the near future a Notice of Proposed Rulemaking concerning the safety of railroad employees working on bridges." In this letter, the FRA also addressed "respective areas of FRA and OSHA jurisdictional authority" and advised the Department of Labor that protection of maintenance-of-way workers is the "responsibility" of the FRA "according to the Policy Statement issued by FRA March 14, 1978." Therefore, as recently as 1989, the FRA reaffirmed its exclusive jurisdiction over railroad bridge safety and adhered to the views expressed in its 1978 Policy Statement.

Furthermore, OSHA itself has recognized that the safety aspects of areas devoted to railroad operations (as defined in the 1978 Policy Statement) are within the specific expertise of the FRA. The OSHA Review Commission, which is responsible for final administrative adjudication of the Occupational Safety & Health Act ("OSH Act"), has deferred to the FRA "as the dominant agency in its limited area" of railroad operations. *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577, 1580 (1982). In the *Consolidated Rail* matter, the OSHA Review Commission assessed the impact of the 1978 FRA Policy Statement and concluded that the Statement, as a representation of the informed judgment of the FRA on the subject of railroad safety, was preemptive in effect.

The state high court, in rejecting this overwhelming federal authority, has intruded improperly upon the jurisdiction of the FRA and the supremacy of federal law. The court's deviation from a uniform regulatory scheme is extremely significant and the impact of its decision will be

felt by numerous railroads, particularly since almost every interstate Class 1 railroad system operates in Illinois. Such a precedent, if allowed to stand, will encourage deviation from the federal regulatory scheme by other state high courts with regard to any number of other matters involving railroad operations. Nationwide regulatory uniformity ultimately could be destroyed if state high courts are allowed to reject clear federal authority in favor of a case-specific or state-specific agenda. The Illinois Supreme Court's decision thus impacts upon railroad operations nation-wide and constitutes a troubling challenge to federal supremacy.

B. Railroads Across The Nation Will Be Substantially Prejudiced If Railroad Safety Regulation Occurs On A Haphazard, Piecemeal Basis.

Consistent with Congressional policy, the FRA has pronounced "that piecemeal regulation of individual hazards [in the field of railroad operations as defined in this Policy Statement] . . . by any other agency of government would be disruptive and contrary to the public interest." 43 Fed. Reg. 10583, 10586 (1978). The legislative and judicial branches of the federal government also have reiterated the need for uniformity in the regulation of railroad operations. The unique interstate character of railroad operations necessitates uniform national regulations to avoid the state-by-state promulgation and application of varying and conflicting regulations which could unnecessarily hinder railroad operations and detrimentally affect safety.

As previously noted, the creation of federal laws specifically geared towards the railroad industry, such as the FRSA and the 1988 Act, reflects a recognition of the need for uniform federal laws and regulations to achieve a

stated national goal. Regulations promulgated by the FRA are sensitive to the unique character of the railroad industry and the industry-specific working conditions encountered by railroad employees. OSHA regulations, by contrast, are not well-suited to the railroad industry. Furthermore, OSHA regulations, unlike federal railroad regulations, can be freely modified or varied by individual state regulation. 29 U.S.C. § 667. Thus, application of OSHA regulations to railroad operations invites disruptive state interference which otherwise would be greatly hindered through the exercise of exclusive, preemptive FRA jurisdiction as Congress intended. 45 U.S.C. § 434.

Expansion of OSHA jurisdiction over operational aspects of the railroad industry will lead to improper fragmentation of railroad regulation, a result Congress sought to avoid by enacting the FRSA. OSHA regulations do not ensure national uniformity because OSHA regulations do not supersede state laws pertaining to work place hazards. *See* 29 U.S.C. § 653. Furthermore, states may displace existing OSHA jurisdiction by developing state standards. 29 U.S.C. § 667(b). On this basis, the OSH Act "gave the states the option of preempting federal regulation entirely." *Gade v. National Solid Wastes Management Ass'n*, ____ U.S. ____, 112 S. Ct. 2374, 2382 (1992). Therefore, the application of a federal OSHA regulation to a railroad jobsite does not foreclose state regulation. Instead, it invites the creation of 50 varying, and possibly conflicting, regulations on a state-by-state basis.

Congress indisputably intended the FRA to apply and enforce, in all areas of railroad operations, a set of comprehensive and uniform safety regulations. 45 U.S.C. § 421. The FRA's declarations of jurisdiction are exclusive and preemptive and have the effect of ousting both OSHA and state regulations from application. *Norfolk*, 727 F. Supp.

367; *Atchison, Topeka & Santa Fe Ry. v. Illinois Commerce Comm'n*, 453 F. Supp. 920 (N.D. Ill. 1977). If state courts are granted free reign to relegate selected railroad operational safety issues to OSHA jurisdiction, piecemeal state regulations will ensue, contrary to Congressional mandates, because OSHA jurisdiction is not exclusive. The creation of such patchwork safety regulation is fundamentally inconsistent with the interstate character of the railroad industry and is in stark contravention of clear Congressional mandates.

Haphazard, unsupported expansion of OSHA jurisdiction certainly will interfere with the efficiency of the interstate railway system. The implications of the Illinois court's decision to impose OSHA rules on railroad bridges underscores this point. The FRA has recently published safety rules providing for fall protection for railroad bridge workers. 57 FR 28116 (1992). Which agency's regulations are now to govern in Illinois? Is the industry to attempt to follow one or both?

Railroad bridge work necessarily is conducted subject to railroad train signal and control systems in a specific fashion to maintain clearances and to limit interference with train operations. The FRA is well-equipped to particularize regulations sensitive to these unique railroad operational issues, whereas OSHA, which wholly lacks expertise in railroad operations, is ill-equipped to promulgate and enforce regulations governing railroad operations. Thus, compliance with and enforcement of non-specific OSHA regulations likely would detrimentally disrupt railroad transportation.

Application of OSHA regulations to matters involving railroad operations, such as work on railroad bridges, will lead only to confusion, which ultimately could endanger

railroad workers. OSHA regulations by their very nature are general standards which apply to myriad industries. Existing, generic OSHA bridge safety regulations, for example, require that life lines, when used, "be secured above the point of operation to an anchorage." 29 C.F.R. § 1926.104. Many railroad bridges, however, do not have any anchorages above the point of operation to which a life line could be secured. Thus, the literal directives of this OSHA regulation would be difficult, if not impossible to apply safely under actual railroad working conditions.

It also is questionable whether OSHA inspectors, who lack in-depth knowledge of railroad operations, are attuned to the specific safety requirements of the railroad industry. "FRA inspectors possess extensive knowledge . . . that is essential to safely complete an inspection" of safety equipment being employed at a railroad operational worksite. 56 Fed. Reg. 3436. OSHA inspectors lack such knowledge. Moreover, "FRA inspectors often are aware of construction and repair operations in progress, and can therefore inspect" for adequate safety equipment in a timely fashion. 56 Fed. Reg. 3436. FRA inspectors also frequent railroad worksites to inspect the work in progress, and they logically are able to assess worker safety at the same time. OSHA, by contrast, whose inspectors do not routinely monitor the operations of the railroad industry, may not be aware of a railroad construction or repair operation in time to send an inspector. Finally, FRA reporting requirements govern injuries to railroad employees working on railroad bridges, and FRA maintains information concerning the occurrence of railroad injuries. Accordingly, FRA is well-equipped to inspect and evaluate injury occurrences and to determine adequate and appropriate forms of redress. OSHA, on the other hand, does not gather or maintain such information. Clearly, uniform

regulation of railroad operational safety by the FRA, in accordance with Congressional mandate, is preferable to non-uniform regulation by OSHA and the states.

Deviation from the longstanding system of national, uniform railroad safety regulation will place a substantial financial strain on the nation's railroads. Following the lead established by the Illinois "precedent," other states may attempt to carve out their own exceptions to the national norm, first declaring OSHA jurisdiction over an aspect of railroad safety, and then modifying or varying the OSHA regulation to satisfy a local agenda. *See Gade*, 112 S. Ct. at 2832. Expenditures will soar and confusion will propagate as the railroads attempt to keep abreast of and comply with the numerous standards that will vary from state-to-state. The shipping public will bear the brunt of increased costs incurred by the breakdown of the uniform regulatory scheme, and railroads and employees alike will bear the brunt of the resulting confusion.

These very considerations confirm the wisdom of Congress in adopting the FRSA and its amendment as a uniform national paradigm for railroad safety regulation. Reasons of public policy, as well as legislative intent and industry needs, compel this Court to reaffirm the uniform regulatory scheme established by Congress.

C. Established Principles Of Federal Supremacy And Justice Mandate The Preservation Of Uniform Regulation Of Railroad Operating Safety.

Congress repeatedly has reaffirmed its commitment to a "uniform body of regulations and enforcement" in the railroad industry. H.R. Report No. 91-1194, U.S. Cong. and Ad. News 4104, 4111 (1970). The ceding of jurisdiction to OSHA of safety issues inherent in railroad operations will allow state regulation over the same working

conditions because OSHA jurisdiction is not exclusive. 29 U.S.C. § 667. The development of myriad state regulations not only is unduly burdensome to the railroad industry, as previously discussed, but it also is directly contrary to clear Congressional intent. *See* 29 U.S.C. § 421. Such derogation of federal law violates traditional principles of federal supremacy and is unacceptable.

The decision of the state high court represents a disturbing rejection of overwhelming contrary federal authority and an unprecedented venture into *ad hoc* drawing of jurisdictional lines between the FRA and OSHA with attendant uncertainty in the railroad industry. The state high court accepted as "controlling," language in the preamble to the FRA's 1991 Notice of Proposed Rulemaking in which the FRA reinterpreted its 1978 Policy Statement thirteen years after the fact.

The Petitioner railroad acted in reliance on the FRA's 1978 Statement that the FRA exercised exclusive jurisdiction over railroad bridges. Nevertheless, in the face of contrary federal decisional law, the state high court affirmed the error of the trial court despite its obligation to defer to federal decisional law in a case arising under the FELA. *Dice v. Akron, C & Y R.R.*, 342 U.S. 359, 361 (1952). In derogation of binding federal policy, the state high court assigned a non-binding notice high precedential value. Finally, in contravention of clear federal legislation conferring jurisdiction over railroad bridge safety upon the FRA, the state high court determined that OSHA jurisdiction existed and that the Petitioner could be found negligent for violating OSHA regulations.

That a majority of the Illinois Supreme Court confirmed the erroneous rulings of the trial court demonstrates that state-by-state determinations of which regulations govern railroads present actual, serious risks, and not just per-

ceived risks of future mischief. Such risks only can be redressed by this Court. Replication of this case by other state high courts will endanger principles of federal supremacy and will enable litigants to "forum shop" to achieve different results depending upon whether the case is filed in state or federal court. The decision of the Illinois Supreme Court is a direct challenge to the supremacy of the federal government which could endanger the efficacy of the national railway transportation system. Guidance of this Court on the proper roles of the FRA and OSHA in the area of railroad safety regulation is necessary to prevent future occurrences of piecemeal determinations by state courts.

Of even more fundamental concern to the nation's railroads (AAR's members), is the challenge presented to basic concepts of justice by the state high court's decision. This nation's railroads have an interest in relying upon clearly defined governmental laws and regulations to which they must conform their conduct. Regulations and standards applicable to railroads must be defined in advance if the railroads are to conform their conduct to such regulations. It is abhorrent to our system of justice that a railroad whose conduct conforms with the mandates of the FRA and Congressional policy, as enacted in the FRSA, can be held *after the fact* to have violated OSHA regulations which the FRA had preempted by its 1978 Policy Statement. The states must not be given unrestricted discretion to determine that a specific OSHA regulation applies to a railroad, based mainly on an FRA administrator's renunciation of his predecessor's policy after more than a decade has passed, and without public process or accountability. This Court should not allow to stand the Illinois Supreme Court's decision in this case which invites the lower courts of Illinois and the courts of other states to trample on basic concepts of fundamental fairness

and due process. The special and important questions of federal law presented in this matter merit consideration by this Court.

CONCLUSION

Although the judicial, legislative and executive branches of the federal government have established and reiterated the FRA's exclusive jurisdiction over safety issues intrinsic to railroad operations, the state high court, on the basis of an agency's policy reversal long after the operative facts before it, held that generic safety regulations promulgated by a separate federal agency applied to this case involving railroad bridge operations. The state high court's decision totally rejects the uniformity of national railroad laws and regulations thoughtfully created by the federal government over the course of a century.

On the basis of the foregoing, amicus curiae, Association of American Railroads, respectfully requests this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted,

DANIEL SAPHIRE
General Attorney
Association of American Railroads
American Railroad Building
50 F Street N.W.
Washington, D.C. 20001
(202) 639-2505

FRANCIS D. MORRISSEY
Counsel of Record
MICHAEL A. POLLARD
DONNA J. WILLIAMS
BAKER & McKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-8000

Counsel for Amicus Curiae, Association of American Railroads